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THE HIERARCHY OF DIFFERING BEHAVIOURAL STANDARDS IN LABOUR LAW: A CASE FOR LIMITED RE-ALIGNMENT?

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Abstract: This paper pursues a line of enquiry regarding employment laws which promulgate standards (rather than rules), the legitimacy of which are premised on the need to scrutinise managerial autonomy pursuant to a norm-setting, rather than norm-reflecting agenda. Insights will be offered in relation to the expectations about the exercise of the managerial prerogative which the law transmits through such standards. The argument is advanced that a by-product of the common law and statutory policy initiatives lying at the heart of the regulation of managerial autonomy has been the emergence of differing behavioural standards in the employment relationship. In order to satisfy the common law and statutory obligations which it owes towards its employees, employers are expected to discharge a variety of standards of conduct and review. These differing standards can be grouped into a hierarchy, exploring how they function at higher or lower levels of managerial scrutiny. The paper proceeds to explore the rationales for the promulgation of such differing behavioural standards in different decision-making contexts. The paper goes on to analyse whether such differing standards are justifiable from a formalistic and doctrinal perspective and considers the desirability of a package of reform consisting of the re-alignment of standards in order to reflect fundamental values underpinning the employment relationship.

Keywords: labour law, employment law, employment rights, labour rights, rules, standards, standards of conduct, standards of review, intensities of scrutiny

The Hierarchy of Differing Behavioural Standards in Labour Law:

A Case for Limited Re-alignment?

1. Introduction

The objective of this paper is the continuation of a line of enquiry regarding employment rights which are promulgated as standards (rather than rules), the legitimacy of which are premised on the need to scrutinise managerial autonomy pursuant to a norm-setting, rather than norm-reflecting agenda. Insights will be offered in relation to the expectations about the exercise of the managerial prerogative which the law transmits through such standards. At the fulcrum of the standard-setting process lies a tension between a recognition of the necessity of freedom of action on the part of the commercial operation of the employer, while at the same time forging a balance which is reflective of the law's concern to police the potential for the exploitation of employees.

In this paper, the argument is advanced that a by-product of the common law and statutory initiatives lying at the heart of the regulation of managerial autonomy has been the emergence of differing behavioural standards of review in the employment relationship. In order to satisfy the common law and statutory obligations which they owe towards their employees, employers are expected to discharge a variety of standards of review in respect of differing employment rights. Section 2 of this paper is essentially a descriptive undertaking whereby the differing standards present in the field of labour law are identified and then grouped into a hierarchy, exploring how they function at higher or lower levels of managerial scrutiny. Section 3 of the paper proceeds to explore the rationales for the promulgation of such differing behavioural standards in different decision-making contexts. The paper goes on to analyse whether such differing standards are

justifiable from a formalistic and doctrinal perspective and considers the desirability of a modest package of reform consisting of limited re-alignment whereby certain standards would be harmonised in similar contexts. Part 4 concludes by asserting that further empirical work is required before any concrete recommendations for a more comprehensive programme of law reform can be made.

2. The Existence of Differing Behavioural Standards

A. General

In a previous paper, the author explored the importance of the distinction between employment rights which are expressed as (i) rules and (ii) standards. The argument was advanced that standards could be divided into standards of conduct and standards of review. Standards of conduct represent the law's method of erecting signposts about the nature of the behaviour expected of employers and are directed at employers. Meanwhile, standards of review are addressed to adjudicators and set the level at which the law expects adjudicators to scrutinise managerial action and decision-making.[1] The fundamental hypothesis which that paper expressed was that the degree of scrutiny associated with a particular standard of conduct ought to inform our understanding of the importance which a system of labour law attaches to the fundamental values and policy considerations which underpin that employment right. In terms of a functionalist normative philosophy which posits that labour law can be understood and ought to be shaped in accordance with the objectives which it is designed to serve, in fixing the intensity of the standard

[1] M. A. Eisenberg, "The Divergence of Standards of Conduct and Standards of Review in Corporate Law" (1993) 62 *Fordham Law Review* 437, 437; W T Allen, J E Jacobs, L B Strine JR, "Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of Van Gorkom and its Progeny as a Standard of Review Problem" (2002) 96 *North Western University Law Review* 449.

of conduct, the common law or legislature ought to, and would appear to,[2] have regard to the strength of the values and policy factors which influence that particular employment right. Adopting the formulation of Allen, Jacobs and Strine,[3] the paper nevertheless proferred the normative contention that the standard of conduct and standard of review ought to deviate where (i) important policy considerations justify such a divergence and (ii) it is clear that (a) more than one decision may be reasonable in response to a given set of circumstances or (b) it is difficult for adjudicators to differentiate between 'bad' decisions taken by the employer from 'good' decisions taken by an employer which turn out 'badly'. A normative framework was tentatively constructed against which that hypothesis could be given greater clarity and strength by building a picture of the spectra of standards against which intensities of review could be charted. The spectra of standards identified were (i) the subjective/objective spectrum which plots intensity against subjective and objective assessments and (ii) the simpler scrutiny spectrum, which charts the strength of review in more general terms from 'weak' to 'strong'. These alternative ranges of intensity of review will be considered in this paper.

It should be clarified at this juncture that this paper is concerned with an examination of standards of review in labour law. That is to say that consideration will be given to the intensity of review attached to the standard of review in the context of differing employment rights – rather than the standard of conduct. This is a logical approach, since the standard of conduct may well be set at a

[2] That much is clear from the judgment of Mr. Elias J in *Heathrow Express Operating Co. Ltd. v Jenkins* [2007] All ER (D) 144 (Feb) at paras 40 – 41, where the point was made that the selection of an objective standard for the standard of review in the case of the employer's duty to make reasonable adjustments (ss. 3A(2) and 4A(1)of the Disability Discrimination Act 1995 ("DDA")) by the Court of Appeal in *Smith v Churchills Stairlifts plc* [2006] IRLR 41, 47 per Kay LJ, was attributable to the fact that this duty enjoins '… an employer… to depart from the usual arrangements in particular circumstances to meet the needs of particular disabled employees', i.e. 'positive discrimination' and the undoubted significance of such a fundamental value of 'positive discrimination' which underpins that duty.

[3] W T Allen, J E Jacobs, L B Strine JR, "Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of Van Gorkom and its Progeny as a Standard of Review Problem" (2002) 96 *North Western University Law Review* 449.

more exacting level of scrutiny than the standard of review. This is so, since the fundamental values and relevant policy preferences which forge the standard of conduct may be offset by such countervailing 'practical fairness' and 'policy' factors referred to above which operate to dilute the intensity of review attached to the standard of review in terms of an approach which is more deferential to management. There is little point in examining employment rights for different standards of conduct, if adjudicators are directed to apply standards of review which are set at a different level of scrutiny. It is the standards of review which are more important, since these are the instruments which are applied by courts and tribunals to determine liability.

With this in mind, it is submitted that there are four principal standards of review of the exercise of the managerial prerogative in the context of labour law today. Those standards are essentially parasitic or accessory to a particular employment right. Depending on the right concerned, the employer's conduct may be judged according to an irrationality standard which is close (yet conceptually distinct) to a subjective standard, others on the basis of an objective standard, some based on a mixture of subjective and objective standards and others on a proportionality standard. Thus, in diverse contexts – and as will be explained, sometimes in the same context, employers are expected to meet diverse standards. The standards encountered by employers in the context of employment laws can be classified within a hierarchy with each set exerting greater or lesser control over the employer's freedom of autonomy. In this paper, these standards are charted from the least onerous to the most exacting on the employer in terms of the normative framework for spectra or ranges of intensity of review discussed in the previous paper, i.e. (i) the subjective/objective spectrum and/or (ii) the simpler scrutiny spectrum.

B. 'Good Faith' and Irrationality Standards

Three implied terms of the contract of employment which are concerned with imposing standards of 'good faith' on the behaviour of the parties are first, the implied term of mutual trust and confidence, secondly the implied term that an employer's decision to award (or not award) discretionary bonuses or benefits are not to be made irrationally or perversely or contrary to good faith ("the discretionary bonus/benefits implied term")[4] and finally the implied term that an employer will not dismiss an employee in order to avoid the making of guaranteed or conditional payments to the employee ("the anti-avoidance implied term").[5] These implied terms have been used by the courts and tribunals to police and regulate the exercise of power and discretion by employers in a manner which is not dissimilar to the supervisory jurisdiction of the administrative courts.[6] But whilst each of these implied terms are both expressed in terms of good faith standards and function to control the exercise of discretionary powers on the part of the employer by effectively conferring employment rights in favour of employees, the behavioural expectations imposed on employers, whilst similar, are not quite aligned. For example, in *Clark v Nomura International plc*,[7] Burton J explained the nature of the 'irrationality/perversity/good faith' test which applies in the context of the discretionary bonus/benefits implied term. He located the applicable standard between a more stringent test of 'capriciousness' which 'carr[ies] with it aspects of arbitrariness or domineeringness, or whimsicality and abstractedness'[8] and a lower test

[4] It has been submitted by the author elsewhere that this particular implied term transcends the fact-specific case of discretionary bonuses to cover the employee's remuneration package generally such as the award of share options or annual salary increases, see D. Cabrelli, "Discretion, Power and the Rationalisation of Implied Terms" (2007) 36 *ILJ* 194, 198.

[5] For a general account of the manner in which implied terms can be applied to radiate behavioural expectations, see L. Barmes, "Common Law Implied Terms and Behavioural Standards at Work" (2007) 36 *ILJ* 35.

[6] However the analogy with the judicial control of administrative action should not be taken too far, on which see *Abu Dhabi National Tanker Co. v Product Star Shipping Ltd.* [1993] 1 Lloyd's Rep. 397, 404 per Leggatt LJ.

[7] [2000] IRLR 766.

[8] [2000] IRLR 766, 774 at para. [40] per Burton J.

of 'reasonableness' which would enable a tribunal or court to substitute its own view for that of the employer, i.e. a purely objective test. Instead, the irrationality/perversity test requires an adjudicator 'to put [its]elf in the shoes of those making the decision'[9] and directs it towards an enquiry as to whether no rational employer would have exercised their discretion in the way that they did.[10] Speaking in the field of corporate law, as Eisenberg recognised, 'a decision that fails to satisfy the rationality standard is a decision that cannot be coherently explained.'[11] So the standard of review in the case of the discretionary bonus/benefits implied term is loose and keeps the supervisory jurisdiction of the courts and tribunals within restricted bounds, circumscribing their scope of action, since it will only be in the most exceptional of cases that a ruling will be made against an employer. The test for assessing the conduct or omissions of the employer in the context of the discretionary bonus/benefits implied term can be contrasted with the test which is applicable for the purposes of determining whether the implied term of mutual trust and confidence has been breached. In determining whether trust has been destroyed, seriously damaged or undermined by the conduct or omissions of an employer, the courts and tribunals adopt an objective test.[12] The distinction between a 'rationality' standard and an 'objective' test was lucidly captured by Lord Justice Rix in *Socimer International Bank Ltd (in liquidation) v Standard Bank London Ltd*.: -

> … pursuant to… [a] rationality test, the decision remains that of the decision-maker, whereas on entirely objective criteria of reasonableness the decision maker becomes the court itself.[13]

[9] *Horkulak v Cantor Fitzgerald International* [2004] IRLR 942 at 950 at para. 51 per Potter LJ.
[10] This approach was approved and applied by Mummery LJ in the case of *Commerzbank AG v Keen* [2007] IRLR 132, 136 at paras. 59 – 60.
[11] M. A. Eisenberg, "The Divergence of Standards of Conduct and Standards of Review in Corporate Law" (1993) 62 *Fordham Law Review* 437, 443.
[12] Lord Nicholls in *Malik v BCCI* [1997] IRLR 462 at page 464, para. [14] and 469, para. 59-60 per Lord Steyn.
[13] [2008] 1 Lloyd's Rep. 558, 577, at para. 66. Writer's annotations in square brackets.

So the objective test enables a court or tribunal to substitute its own judgment for that of the employer. But in the case of the implied term of mutual trust and confidence, the objective test does not proceed on the basis of the extent to which the employer was reasonable.[14] Such an approach, as will be explained below, is appropriate in the case of the employer's duty to exercise reasonable care for the welfare of the employee. Instead, it is only where an employer's conduct on an objective assessment results in the destruction or severe undermining of trust and confidence that an adjudicator will rule that there has been a breach of the implied term of mutual trust and confidence. The objective component inherent within the implied term of mutual trust and confidence affords the courts and tribunals a wide berth for manoeuvre in calling the behaviour of the employer to account. Meanwhile, the test which an adjudicator must apply as a means of determining whether the anti-avoidance implied term has been breached is not altogether clear from the case law.[15]

What is clear is that the tests applicable in the case of each of the above three implied terms differ. The behavioural standards expected of the employer in the case of the discretionary bonus/benefits implied term are much less stringent than in the case of the implied term of mutual trust and confidence. This is slightly odd, since both share many affinities as noted above. The rationales advanced by the judiciary for the formulation of the irrationality/perversity standard of review in the case of the discretionary bonus/benefits implied term is worthy of

[14] There is no duty imposed upon an employer to treat an employee reasonably, see *Post Office* v *Roberts* [1980] IRLR 347 and *White* v *Reflecting Roadstuds Ltd.* [1991] IRLR 331.

[15] It could be argued that the test must surely be objective, akin to the behavioural standard applicable in the case of the implied term of mutual trust and confidence, given the similarities between the two implied terms. Indeed, in a number of cases and academic writings, the anti-avoidance term has been treated as a manifestation of the implied term of mutual trust and confidence. But this would be speculation, since it is difficult to isolate any clear standard of review which must be applied by the adjudicator from the judgments in the relevant cases.

consideration at this stage[16] One gains the impression from the case law that the courts and tribunals were implicitly concerned to construct a standard which was deferential to an employer's judgment. A standard of review based on reasonableness, namely 'without reasonable or sufficient grounds' was perceived to be too exacting a standard to expect an employer to discharge. Meanwhile, 'capriciousness' was too lax. But the precise reason why the courts and tribunals selected the test of rationality remains unexplained.

It may be useful to speculate on the policy considerations which may have influenced the judiciary in formulating such a standard of review given the absence of a patent explanation in the case law. As a matter of policy, it may be wise for the courts and tribunals to devise a scheme which defers to an employer in forging the level of payment or award made to an employee in the case of a discretionary bonus or benefit. This is based on an implicit recognition that employers will understand their business and the commercial environment within which they operate better than any court or tribunal, including the best practices (and industry practices) designed to motivate and incentivise staff through the fashioning of the bonus, benefits or remuneration packages. Another policy reason would be reflective of the interplay between what is of course definitionally a contractual discretion and the nature of the standard of review. That is to say that to fix the level at which an adjudicator must assess an employer's decision not to award a discretionary bonus/benefit (or to award a discretionary bonus/benefit at a particular amount) at too high a point might be seen as not too great a leap towards the judiciary overriding the discretionary nature of the contractual bonus. If a contract provides that an employer's decision to award a bonus or benefit is discretionary, then to apply an objective standard of review might be objectionable in that it gives a court or tribunal a free hand to replace the employer's judgment

[16] The rationales for the objective test in the case of the implied term of mutual trust and confidence will be considered later in this paper.

with that of its own. This might be viewed as coming too close to comfort to the courts rewriting the employment contract for the parties.[17] Thus, as a matter of policy, it may be advisable for the law to defer to the judgment of employers to a certain degree and fix a standard of review which is low, i.e. rationality.

C. The 'Range of reasonable responses' standard

From the standpoint of the degree of scrutiny exerted upon the managerial prerogative, the 'range of reasonable responses' standard of review is located somewhere below the laxity of review evidenced by the 'irrationality/perversity' test. Both tests import a margin of discretion for manoeuvre in favour of the employer, importing elements of a subjective standard. However, the discretion afforded to the employer by the 'range' test is not absolute and is curtailed to a greater degree than the 'irrationality/perversity' standard. A 'range of reasonable responses' formula denies the court or tribunal a free hand to substitute its own judgment for that of the employer. Instead a tribunal is enjoined to ascertain the band of responses which a reasonable employer might take in face of the particular actions or omissions of an employee. The test is encountered in the context of the determination of the reasonableness of a dismissal of an employee in terms of section 98(4) of the Employment Rights Act 1996 ("ERA") for the purposes of the statutory concept of unfair dismissal.[18] Although it has been criticised in the Employment Appeal Tribunal[19]

[17] This is one way of perceiving what a court or tribunal is doing where it applies an objective test to control discretionary powers. Another way of looking at the same process is to argue that the court or tribunal would be engaged in an exercise of procedural fairness, whereby an express term which confers a discretionary power upon an employer must be exercised in a manner which is consistent with the implied terms of the contract of employment.
[18] *British Home Stores Ltd. v Burchell* [1978] IRLR 379; *Iceland Frozen Foods Ltd. v Jones* [1982] IRLR 439; *Post Office v Foley, HSBC Bank plc (formerly Midland Bank plc) v Madden* [2001] 1 All E.R. 550.
[19] *Haddon v Van Den Bergh Foods Ltd*. [1999] I.R.L.R. 672, 676 per Morrison J.

and by academic commentators,[20] and referred to by the judiciary,[21] as a form of a 'perversity' test not dissimilar to the irrationality/perversity standard in the context of the discretionary bonus/benefits implied term,[22] it is objectively demonstrable that there is a distinction between the two, albeit subtle.[23] Rather than a court or tribunal being directed to make an enquiry as to whether no reasonable employer would have dismissed the employee in the circumstances of the case (which would be a difficult burden for an employee to discharge), the court or tribunal must identify a band or range of responses which a reasonable employer would take. If the decision or action taken, or sanction adopted, by the employer does not feature on the list of reasonable responses identified by the court or tribunal, the adjudicator must rule that such decision or action was unreasonable. By emphasising what is reasonable rather than what is unreasonable, the focus of the 'range' test is different which leads towards the point of demarcation between what is reasonable and unreasonable being fixed at a different spot than if the question were posed in terms of unreasonableness or irrationality.[24] Since the outcome of the application of the two standards is that the line between what is reasonable and unreasonable is drawn at different places, it makes no sense to argue that there is no difference between them. If the standards were the same and simply expressions of the same approach, there would be no difference in the demarcation point.[25]

[20] H. Collins and M. Freedland, "Finding the Right Direction for the 'Industrial Jury': *Hadden v Van den Bergh Foods Ltd*/*Midland Bank plc v Madden*" (2000) 29 *ILJ* 288, 294 per H. Collins; H. Collins, *Justice in Dismissal* (Oxford, Clarendon Press, 1992) at pp. 8 and 38-39; A. Freer, "The Range of Reasonable Responses Test – From Guidelines to Statute" (1998) 27 *ILJ* 335; M. Rubenstein [2000] IRLR 801.

[21] See *Smith and Grady v UK* [1999] IRLR 734, 752.

[22] Or alternatively, as a test which collapses quite easily into such a 'perversity' test.

[23] See the analysis by P. Elias (now President of the EAT) in P. Elias, "Fairness in Unfair Dismissal: Trends and Tensions" (1981) 10 *ILJ* 201, 205-206.

[24] H. Collins, *Justice in Dismissal* (Oxford, Clarendon Press, 1992) at p. 39; A. Freer, "The Range of Reasonable Responses Test – From Guidelines to Statute" (1998) 27 ILJ 335, 340-341.

[25] So the writer would disagree with Rubenstein and Freer that there is no difference between the two standards.

Confined at one time to the question of the fairness of a dismissal for the purposes of section 98(4) ERA, the range of reasonable responses test has branched out, leap-frogging over to fresh terrain in the past decade or so. So a particular construction of the range of reasonable responses standard is also applicable in the context of the justification defence in the case of 'disability-related discrimination' in s. 3A(1) of the Disability Discrimination Act 1995 ("DDA"). Section 3A(1)(b) of the DDA enables an employer to justify the less favourable treatment of a disabled person for a reason related to his/her disability provided that the justification is 'both material to the circumstances of the particular case and substantial'.[26] In *Jones v Post Office*,[27] the Court of Appeal held that a tribunal should consider whether the reason advanced by the employer for the treatment of the disabled person fell within the range of what a reasonable employer would have relied on as a material and substantial reason for the less favourable treatment. Thus, a tribunal is not entitled to enquire whether the employer's reason for the disability-related discrimination was material and substantial and then substitute its own judgment for that of the employer if it disagrees with the judgment of the employer, since this would involve the application of an objective standard.[28] Instead, the tribunal must make a list of the reasons which reasonable employers would consider to be material and substantial reasons for the less favourable treatment. If the reason advanced by the employer for the less favourable treatment in a particular case is not included on the tribunal's list, the employer will not have satisfied the s. 3A(1)(b) DDA defence.

In the same context of disability discrimination, an employer owes a disabled employee a duty to make reasonable adjustments where the application of a provision, criterion or practice or a

[26] S. 3A(3) of the DDA.
[27] [2001] IRLR 384.
[28] [2001] IRLR 384, 388 per Pill LJ.

physical feature of the employer's premises puts that employee at a substantial disadvantage in comparison with persons who are not disabled.[29] The standard of review in ascertaining whether the employer has breached the duty to make reasonable adjustments is objective in nature.[30] The rationale for the objective test is based on the words 'such steps as it is reasonable … for him *to have* to take' in section 4A(1) of the DDA which legitimize an adjudicator to undertake a wide scope of enquiry. So as regards the prohibited ground of disability discrimination, in the case of disability-related discrimination under s. 3A(1) of the DDA, the employer's conduct is assessed by reference to a 'range of reasonable responses' standard, whereas in the case of the s. 3A(2) DDA duty to make reasonable adjustments, an objective standard is applied by the tribunal. The former is more forgiving of the employer's conduct, whereas the latter empowers an adjudicator to take a more interventionist approach.

The temptation is to proclaim that the presence of differing standards in the context of the DDA renders the law incoherent and that it should be reformed, since whether a disabled claimant who has suffered from prejudicial and discriminatory conduct at the hands of their employer will obtain relief will depend on how their tribunal claim is framed, i.e. a s.3A(1) DDA or s. 3A(2) DDA claim. However, such a temptation should be resisted on the basis that such a call for reform proceeds on too simplistic an analysis. There are two reasons for such a position. First, an employer is disempowered from pleading a justification defence in terms of disability-related discrimination under s. 3A(1)(b) DDA unless it has satisfied its duty to make reasonable adjustments in terms of section 3A(2) DDA. That is to say, the tribunal or court must first determine whether the employer owed the employee a duty to make adjustments, what the content of any such duty was in the

[29] Ss.3A(2), 4A and 18B of the Disability Discrimination Act 1995.
[30] See *Collins v Royal National Theatre Board Ltd.* [2004] IRLR 395, 398 per Sedley LJ; *Smith v Churchills Stairlifts plc* [2006] IRLR 41, 47 per Kay LJ.

circumstances and what the position would have been if the employer had fulfilled any such duty that was incumbent on it.[31] This is important, since it means that the 'range of material and substantial reasons' test associated with the employer's justification defence in s. 3A(1)(b) DDA will be postponed to the objective standard connected to the s. 3A(2) DDA duty to make reasonable adjustments. It will only be if the latter objective test is satisfied that a movement will be made to consider the 'range of material and substantial reasons' standard and so, in a number of cases, there will be no need to consider the 'range' test. This approach discredits the argument that the law is incoherent on the basis of an argument that the nature of the applicable standard depends on how a tribunal or court claim is framed.

Secondly, in the case of *Heathrow Express Operating Co. Ltd. v Jenkins*,[32] Elias J opined that there was a 'perfectly comprehensible rationale' for the difference in the tests.[33] The reason for the divergent approach could be explained by invoking the respective consequences of the application of s. 3A(1) and (2) DDA on the employer's arrangements in running its commercial operation. The justification test in the context of disability-related discrimination operates at the more lenient standard of a range of reasonable responses in order to respect the prerogative afforded to management in choosing how to organise their business practices. Here, there is an implicit recognition in the law that there may be good commercial or other reasons for an employer to apply a commercial function or practice which nevertheless inadvertently results in a person who is disabled suffering less favourable treatment on the basis of a reason related to that person's disability. It is submitted that the effect of s. 3A(3) DDA is to ensure that the concept of 'disability-related' discrimination in s. 3A(1) DDA is not concerned with changing the employer's commercial

[31] *Archibald v Fife Council* [2004] IRLR 651, 655-656 per Lord Rodger and s.3A(6) DDA.
[32] UKEAT/0497/06/MAA; [2007] All ER (D) 144 (Feb).
[33] Ibid. at paras 40 – 41.

operations but with assessing the weight of the rationales for certain practices which result in less favourable treatment by reference to a 'material and substantial' criterion. Meanwhile, the objective nature of the test applicable in the case of the duty to make reasonable adjustment recognises that the legitimate arrangements designed by the employer may nonetheless result in a disabled employee suffering a substantial disadvantage. Here, the statutory wording enjoins a tribunal to take a more interventionist approach by transmitting a clear signal that the employer's commercial practices will require to be modified to comply with the law. Elias J's exposition of the rationale for the distinction in the tests recognises the far-reaching scope of the employer's s. 3A(2) DDA duty to make reasonable adjustments when it is compared with the employer's s. 3A(1) DDA duty. That is to say that the former entails an element of positive discrimination in favour of the disabled employee and a departure from the employer's general business practices, whereas the latter does not.[34]

Nevertheless, despite Elias J's insightful contribution towards an understanding of the rationales for these differing standards in the case of the DDA, academic and judicial commentators have expressed criticism or misgivings regarding the desirability of applying a variant of the range of reasonable responses standard to the employer's justification defence in s. 3A(1) of the DDA. First, Davies has argued that the 'range of reasonable responses' standard of review is conceptually misplaced since it fails to direct employers to alter their existing behaviour.[35] Furthermore, in the case of *O'Hanlon v Revenue and Customs Commissioners*,[36] Sedley LJ expressed reservations regarding the suitability of the 'range' test adopted by the Court of Appeal in *Jones*.[37] One might

[34] *Archibald v Fife Council* [2004] ICR 954, 969 at para. [57] per Baroness Hale.
[35] Jackie Davies, "A Cuckoo in the Nest? A 'Range of Reasonable Responses', Justification and the Disability Discrimination Act 1995" (2003) 32 *ILJ* 164, 183.
[36] *O'Hanlon v Revenue and Customs Commissioners* [2007] IRLR 404, 418.
[37] *Jones v Post Office* [2001] IRLR 384.

also speculate that such reservations have filtered down to the policy level, since in the consultation paper of the Discrimination Law Review, one of the recommendations made was that the justification defence and the 'range' test ought to be replaced by a proportionality test.[38] The proportionality test amounts to an objective justification approach and if incorporated within any future Singe Equality Act would remove the margin of discretion afforded to employers by the 'band' test.

Somewhat controversially, the range of reasonable responses standard has also been deployed for the purposes of a complaint of constructive dismissal in terms of s. 95(1)(c) ERA in the context of an employer's handling of an employee's grievance. Generally speaking, if an employee demonstrates that the employer's conduct is such that it destroys or severely undermines trust and confidence in the employment relationship, the employer will not be liable if they can establish on objective grounds that they had reasonable and proper cause for their conduct.[39] However, in circumstances where an employee claims that the employer's conduct in dealing with a grievance which they have raised is in breach of the implied term of mutual trust and confidence amounting to a constructive dismissal, in enquiring whether the employer had a reasonable and proper cause for so acting, rather oddly, an adjudicator must ascertain whether the actions of the employer fell within the range of reasonable responses open to it. This is the effect of Lady Smith's judgment in *Abbey National plc v Fairbrother*.[40] The application of a variant of the range of reasonable responses test in the context of a constructive dismissal claim based on a breach of the implied term of mutual trust and confidence has generated a certain amount of disquiet.

[38] "Discrimination Law Review: A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain - A consultation paper", paras. 1.46 – 1.53 at pp. 41-42 and "The Equality Bill – Government Response to the Consultation" Cm 7454, July 2008 at paras. 11.12 – 11.28.
[39] *RDF Media Group Plc v Clements* [2008] IRLR 207, 218 at para. [103] per Livesey QC.
[40] [2007] IRLR 320 325 at para. [36]. This approach has been endorsed in *Barratt v Accrington and Rossendale College* UKEAT/0099/06/RN; [2007] All ER (D) 34 (Jan) at paras. 29-32.

Commenting in the highlights section of the Industrial Relations Law Reports, Rubenstein objected that Lady Smith had introduced a perversity standard into what had traditionally been considered an objective question.[41] In academic writings, it has been argued that the 'range' test in this context ought to be replaced by a purely objective standard.[42] The task of the adjudicator can also be attacked on grounds of incoherency since if a ruling is made that the employer had no reasonable and proper cause for their conduct on the basis of the 'range' standard, the adjudicator must then proceed to a second stage and consider whether trust and confidence has been destroyed or seriously undermined on the basis of an objective standard. Thus, here we have the application of a two-stage approach, with the more forgiving 'range' standard operating in close proximity to the objective test which enables a tribunal to engage in a wider scope of enquiry. It could be argued that such an approach is inherently anomalous and introduces tensions in the law. Further, the case law establishes that the 'range' test does not apply to the question of reasonable and proper cause where the conduct of the grievance represents 'the last straw'', upon which the employee claims constructive dismissal.[43] Thus, if the conduct of the grievance is the 'last straw', the employer's action is measured according to an objective test, whereas if it is not a 'last straw' case, a 'range' test is applied to the question whether the employer has reasonable and proper cause for the conduct and if so, it is then assessed in quick succession by an objective test. The difficulties associated with the application of such subtle distinctions to factual cases are all too apparent by virtue of the litigation which has been generated, such as *Claridge v Daler*

[41] [2007] IRLR 295.
[42] Matthew Boyle, 'The Relational Principle of Trust and Confidence' (2007) *OJLS* 633, 646.
[43] *GAB Robins (UK) Ltd. v Triggs* [2007] IRLR 857, 861 per Clark J. The appeal of *Triggs* to the Court of Appeal ([2008] IRLR 317) was successful, but the appeal did not concern the question of the test for ascertaining constructive dismissal and was confined to remedies.

Rowney Ltd.[44] Again, the law of constructive dismissal in this context is susceptible to the charge that it is irrational.

Therefore, there is clear evidence of the movement of the 'range' test beyond its original habitat of unfair dismissal. However, the story of legal migration and transplantation has not been one of uniform wholesale success. For example, an attempt to apply a variation of the range of reasonable responses test in the context of the employer's objective justification and proportionality defence as it applies to indirect sex discrimination (as governed by s. 1(2)(b)(iii) of the Sex Discrimination Act ("SDA")) was rejected by Pill LJ in the case of *Hardy & Hansons plc v Lax*.[45] Pill LJ was of the view that in undertaking a review based on a proportionality criterion, an adjudicator is invited to form 'its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary.'[46]

What have been the motives or rationales for the materialisation of the interpretative technique of the 'range of reasonable standard' adopted by the judiciary towards section 98(4) of the ERA? As remarked by Collins, the reasons for the adoption of such a test have not been clearly articulated by the judiciary.[47] Anderman has identified three particular explanations which he argues are expressed in utilitarian or instrumental terms. The first explanation invokes the judicial reluctance towards the second-guessing of managerial decisions. Elias has echoed this point by re-formulating it in terms to the effect that the judiciary are less comfortable with engaging in a

[44] [2008] IRLR 672.
[45] [2005] IRLR 726.
[46] [2005] IRLR 726, 732 at para. 32 per Pill LJ.
[47] H. Collins and M. Freedland, "Finding the Right Direction for the 'Industrial Jury': *Hadden v Van den Bergh Foods Ltd/Midland Bank plc v Madden*" (2000) 29 ILJ 288, 289 – 295 per H. Collins.

review of the substance of managerial decisions than they are with scrutinising the procedures applied by the employer in reaching such decisions.[48] Secondly, the application of the standard can be perceived as a means of avoiding an over-intrusive approach to adjudication which might otherwise dissipate valuable, limited resources. Finally, the standard represents a compromise between managerial efficiency or autonomy and the protection of employees. Collins has also offered other explanations, such as the judiciary being keen to avoid a negative view of the legitimacy of their role, a judicial response to the 'floodgates' argument[49] and a conception of justice in dismissal articulated in terms of intervention duly restricted to circumstances where the actions of employees have not resulted in harm to the employer's legitimate commercial interests.[50] Indeed, in the view of Collins, the 'range test' does not actually set standards, but instead sets boundaries.[51] He argues that a more fitting conception of justice in dismissal in terms of the statutory test of unfair dismissal would be captured by a test expressed in terms of a proportionality standard.[52]

In the previous paper it was submitted that a more revealing exposition of the rationales for the emergence of the 'range' standard can be secured by making a distinction between the standard of conduct expected of the employer and the nature of the review which must be undertaken by an adjudicator. The writer does not wish to repeat here the relevant issues which emerge as a result of such a distinction and readers are directed towards the earlier paper. However, suffice to say that the argument was made in favour of two reasons for a divergence in the intensity of

[48] P. Elias, "Fairness in Unfair Dismissal: Trends and Tensions" (1981) 10 *ILJ* 201, 211.
[49] H. Collins and M. Freedland, "Finding the Right Direction for the 'Industrial Jury': *Hadden v Van den Bergh Foods Ltd*/*Midland Bank plc v Madden*" (2000) 29 *ILJ* 288, 289 – 295 per H. Collins.
[50] H. Collins, *Justice in Dismissal* (Oxford, Clarendon Press, 1992) at pp. 97-102.
[51] H. Collins, *Justice in Dismissal* (Oxford, Clarendon Press, 1992) at pp. 98-100. This point is also made by Freer, A. Freer, "The Range of Reasonable Responses Test – From Guidelines to Statute" (1998) 27 *ILJ* 335, 342.
[52] H. Collins and M. Freedland, "Finding the Right Direction for the 'Industrial Jury': *Hadden v Van den Bergh Foods Ltd*/*Midland Bank plc v Madden*" (2000) 29 *ILJ* 288, 296 per H. Collins.

managerial scrutiny attached to the standard of conduct and the standard of review, namely (i) 'practical fairness' and (ii) policy choices, with such rationales applied to the section 98(4) ERA concept of 'substantive fairness' in dismissal to identify why such a deviation was warranted.

D. Objective Standards

In the field of labour law, an objective standard is applied in three particular contexts. First, an objective test is harnessed as a means of ascertaining whether an employer has breached the implied term of the contract of employment which enjoins it to exercise reasonable care for the physical and psychiatric welfare of its employees, Thus, the standard of care associated with the implied duty of care is whether the employer acted reasonably and prudently, objectively construed.[53] Such a standard directs an adjudicator towards an enquiry of what a reasonable person would have done in the factual circumstances, taking into account in particular the foreseeability of harm, the magnitude of the risk of that harm occurring, the gravity of the harm which may take place, the cost and practicability of preventing it, and the justifications for running the risk. If the adjudicator rules that the reasonable person on an objective assessment would have acted in a manner, or taken steps, which the employer failed to take, the employer will be deemed to be in breach of duty.

Secondly, whether an employer (or employee for that matter) has breached the implied term of mutual trust and confidence is also assessed by reference to an objective standard. The adjudicator's task is channelled towards an analysis of the impact of the employer's conduct on

[53] *Nettleship v Weston* [1971] 2 QB 691, 702 per Denning MR; *Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd* [1968] 1 W.L.R. 1776, 1783D - E per Swanwick J; *Barber v Somerset County Council* [2004] 1 W.L.R. 1089, 1110 per Lord Walker; *Sutherland v Hatton* [2002] IRLR 263, 270 per Hale LJ.

the employee and the objective nature of the enquiry enables a court or tribunal to substitute its own judgment for that of the employer. If the adjudicator is of the view that the actions or decisions of the employer have, without reasonable and proper cause, destroyed or seriously damaged the trust and confidence inherent in the employment relationship, the employer will be held to be in breach regardless of its motive or subjective intentions.[54] However, there is an exception whereby the more lenient range of reasonable responses standard is applied. As explained above, the exception applies in the case of a constructive dismissal claim where the employee alleges that the employer's conduct of a grievance procedure amounts to a breach of the implied term of mutual trust and confidence.[55]

Thirdly, a close inspection of the small print of the employer's statutory duty to make reasonable adjustments in terms of sections 3A(2), 4A(1) and 18B of the DDA reveals the presence of objective criteria. In terms of section 4A(1) of the DDA, in discharging its obligation to make adjustments to the physical aspects of premises or provisions, criteria and practices, the duty of the employer is to take such steps as are reasonable, in all the circumstances of the case. Such words afford a wide berth to an adjudicator to investigate and intervene. This is amply demonstrated by *Collins v Royal National Theatre Board Ltd*.[56] and the judgment of Kay LJ in *Smith v Churchills Stairlifts plc*.[57]

Although the objective standards in each of the three contexts described above give an adjudicator the power to substitute their own judgment for that of the employer, at a definitional

[54] *Malik* v *BCCI* [1997] I.R.L.R. 462, 468 at para. 59 per Lord Steyn and *RDF Media Group Plc v Clements* [2008] IRLR 207, 218 per Livesey QC.
[55] *Abbey National plc v Fairbrother* [2007] IRLR 320, 325 at para. [36] per Lady Smith.
[56] [2004] IRLR 395.
[57] [2006] IRLR 41.

level, the rights function in a way which naturally constrains the potential for a strong degree of intervention. The potential is thus minimised for the tribunals and courts to be levelled with the accusation that their role lacks legitimacy. For example, in the case of the implied duty of care, the conduct of the employer must be such that it failed to take the requisite steps necessary to discharge the standard of care. In the case of the implied term of mutual trust and confidence, the conduct of the employer must be so severe that trust and confidence has been destroyed or is severely undermined. In both cases, these are very high tests despite the objective character of the standard of review.

This leads to an important question. That is to say, what have been the motives for the materialisation of such standards of review? First, in the context of the enquiry whether the employer has discharged the standard of care for the purposes of the implied contractual duty of care, the rationale for the objective nature of the standard is predicated on the need to ensure fair and consistent decisions. Moreover, law and economics scholars have argued that the 'information cost of determining each [employer's] intelligence and ability to make judgments of this sort would be too great to justify departing from the reasonable-man standard'.[58] Secondly, as for the scrutiny of the conduct of the employer in the case of the implied term of mutual trust and confidence, one might conjecture that the objective test is based on a desirability to avoid inconsistent decisions in the law. If the presence of a breach of the implied term of mutual trust depended on the subjective intentions or motives of employers, then the same conduct in different cases would result in different outcomes. Moreover, in *Malik v BCCI*,[59] Lord Steyn endorsed the objective approach with the rationale that it reflected 'classic contract law

[58] W. L. Landes and R. A. Posner, *The Economic Structure of Tort Law* (Cambridge, Massachusetts, Harvard University Press, 1987) 127. Writer's annotations in square brackets.
[59] [1997] IRLR 462, 464.

principles'.[60] One might also hypothesise that an indirect influencing factor on the emergence of a wider scope of review (in the guise of the objective test) in the case of implied term of mutual trust and confidence has been a recognition by the judiciary that de-unionisation, de-collectivisation and the growth in globalisation and privatisation over the past 30 years or so have resulted in lower job security for workers and a concomitant increase in their vulnerability.[61] However, one might justifiably cavil that such factors have acted as contributors to the emergence of the term itself as opposed to the standard of review which attaches to the term and determines whether it has been breached. Finally, with regard to the reasonable adjustments of an employer in the case of s. 3A(2), 4A(1) and 18B DDA, the reasoning for the objective nature of the standard has been explained above. That is to say that the objective nature of the duty is desirable since the duty is concerned with changing the commercial practices of the employer where their effect is to substantially disadvantage disabled employees, enjoining positive discrimination in favour of a disabled employee.

E. The Proportionality standard

'Proportionality' is another standard which is applied to judge the conduct, actions or decisions of employers in the context of the employment relationship. It is encountered in the field of indirect discrimination law on the prohibited grounds of sex, race, religion, belief, sexual orientation and age. The test directs an adjudicator to enquire whether the application of a provision, criterion or practice ("PCP") by an employer amounts to a 'proportionate means of achieving a legitimate

[60] [1997] IRLR 462, 469, para. [59].
[61] *Johnson* v. *Unisys* [2001] 2 W.L.R. 1076 at p. 1084 per Lord Steyn; D. Brodie, "Legal Coherence and the Employment Revolution" (2001) 117 *LQR* 604, 604; P. Davies and M. Freedland, *Towards a Flexible Labour Market: Labour Legislation and Regulation Since the 1990s* (Oxford, OUP, 2007) at pp. 17-22.

aim'.[62] Thus, it is applied as a form of managerial defence to a PCP which is prima facie indirectly discriminatory. The proportionality standard implements EU law and in particular the text of Articles 2(1)(b), 2(2)(b) and 2(2)(b)(i) of the Recast Equal Treatment Directive,[63] the Racial Discrimination Directive[64] and the Framework Directive.[65] The actual text of each of the aforementioned Directives imposes a requirement on the tribunal or court to ascertain whether the means of achieving the legitimate aim is 'appropriate and necessary'. This represents a slightly different emphasis than the UK 'proportionate means' formulation and Bamforth, Malik and Cinneide have commented that 'there is concern that the domestic legislation makes use of a weaker formula',[66] imposing a less rigorous standard of review. The relative approach to the proportionality standard was expounded by the European Court of Justice in the case of *Bilka-Kaufhaus GmbH v Weber Von Hartz*,[67] which was endorsed as the correct approach by Lords Keith and Nicholls in *Rainey v Glasgow Health Board*[68] and *Barry v Midland Bank*[69] respectively, that is to say that the adjudicator must consider whether the PCP applied: -

> correspond[s] to a real need on the part of the [employer], [is] appropriate with a view to achieving the objectives pursued and [is] necessary to that end. [70]

[62] S. 1(2)(b)(iii) Sex Discrimination Act 1975, s. 1(1A)(c) Race Relations Act 1976, Reg. 3(1)(b)(iii) Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660), Reg. 3(1)(b)(iii) Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003/1661) and Reg. 3(1) Employment Equality (Age) Regulations 2006 (SI 2006/1031).
[63] Council Directive No. 2006/54/EC of 5 July 2006, on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204/23
[64] Council Directive No. 2000/43/EC of 29 June 2000, on the implementation of the principle of equal treatment between persons irrespective of racial or ethnic origin OJ L 180/22.
[65] Council Directive No. 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation OJ L 303/16.
[66] N. Bamforth, M. Malik and C. O'Cinneide, *Discrimination Law: Theory and Context: Text and Materials* (London, Sweet & Maxwell, 2008) 322.
[67] 170/84 [1986] IRLR 317 ECJ.
[68] [1987] A.C. 224, 238.
[69] [1999] IRLR 581, 586-587.
[70] 170/84 [1986] IRLR 317, 320, para. [36] ECJ.

The above task breaks down into a three-stage approach which requires the adjudicator to undertake a critical evaluation of first the business needs of the employer which is essentially an objective pursuit in nature,[71] secondly whether the application of the PCP is appropriate and finally whether it is necessary. Thus, the employer's legitimate aim must not be taken at face value and whether the aim is legitimate is assessed objectively, as is the 'appropriate' and 'necessary' evaluation of the ostensibly legitimate aim.

Although the proportionality standard is objective in nature, in its operation in practice it is slightly different from a purely objective standard. First, the proportionality test possesses the attractive feature of divorcing the adjudicator's review from the requirement to make comparisons with other employers which in certain circumstances may be inappropriate. Another way in which the two standards differ is that traditionally understood, proportionality does not involve the courts substituting their judgment on the merits of a case for that of the employer (as the primary decision-maker).[72] Moreover, there is an argument that a proportionality standard demands a more reasoned justification from employers for the treatment afforded to their employees. Hence, the factual bases which guided their actions must be ventilated before an adjudicator, imposing a more intrusive level of judicial activism than a purely objective standard.[73] Another difference from the objective standard of review is that the proportionality standard involves a variable intensity of review depending on the nature of the prohibited ground of discrimination

[71] *Hardy & Hansons plc v Lax* [2005] IRLR 726, 731-732 at paras. 31-32 per Pill LJ. The proportionality review does not encompass a 'range of proportionate standards'.
[72] Craig, P., 'Unreasonableness and Proportionality in UK Law' in Ellis E., *The Principle of Proportionality in the Laws of Europe* (Oxford, OUP, 2004) 85-87. But compare this with the contrary view of other commentators, Green N., 'Proportionality and the Supremacy of Parliament in the UK', in Ellis E., *The Principle of Proportionality in the Laws of Europe* (Oxford, OUP, 2004) 146 and Ellis E., 'Proportionality in European Community Sex Discrimination Law' in Ellis E., *The Principle of Proportionality in the Laws of Europe* (Oxford, OUP, 2004) 180.
[73] Ibid, 100.

and the consequences of the discriminatory treatment.[74] For example, in certain circumstances in the case of discriminatory treatment, the level of review incorporates an appreciable margin of deference whereas in others, the intervention of the court or tribunal is much more intense. This variability feature can be contradistinguished from the objective standard of review where the notion of a variable degree of scrutiny of managerial action in differing contexts has been expressly rejected by the judiciary.[75] Finally, proportionality can also be contrasted with the range of reasonable responses standard, in the sense that the latter is norm-reflecting rather than norm-setting.

The rationale for the introduction of the proportionality standard can be identified by reference to the source from which it originated. It appears to have emerged from the area of public law: German public law to be precise. It was subsequently transposed into European law in 1971 as a general principle of law in the case of *Internationale Handelsgessellschaft v Einfuhr – und Vorratsstelle Getreide*.[76] In European public law, it is linked to the principle of liberal democracy and on a more general note espouses the notion that 'regulatory intervention must be suitable to achieve its aims',[77] whether the source of such intervention is a public body, such as a local authority or Government department, or indeed a private employer. Another rationale for the emergence of the proportionality standard is immersed in its connection 'to the principle of

[74] N. Bamforth, M. Malik and C. O'Cinneide, *Discrimination Law: Theory and Context: Text and Materials* (London, Sweet & Maxwell, 2008) 115-116 and 329; E. Ellis, "The Concept of Proportionality in European Community Sex Discrimination Law", in E. Ellis (Ed.), *The Principle of Proportionality in the Laws of Europe* (Oxford, Hart, 1999) 171-180; T. Tridimas, 'Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny' in Ellis E., *The Principle of Proportionality in the Laws of Europe* (Oxford, OUP, 2004) 84.
[75] *Nettleship v Weston* [1971] 2 QB 691, 707 per Megaw LJ.
[76] (C-11/70) [1970] ECR 1125.
[77] Tridimas T., 'Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny' in Ellis E., *The Principle of Proportionality in the Laws of Europe* (Oxford, OUP, 2004) 65.

respect for fundamental rights'.[78] Indeed, in the employment law context where one encounters the proportionality standard, it is indelibly linked to the fundamental principle of equal treatment and equality of opportunity. Particularised to the law of equal treatment in the context of employment, underpinning the proportionality standard lies a recognition that there may be an objective factor unrelated to a prohibited ground of discrimination which supplies explanatory force for the treatment afforded to an employee which is not only suitable but necessary to achieve that objective purpose.

3. A Hierarchy of Behavioural Standards

A. Introduction

At the beginning of this article, the view was expressed that the standards of review which employers are expected to discharge can be classified within a hierarchy and charted across a spectrum. In a previous paper, the writer erected a normative framework for the measurement of intensities of review, invoking two possible spectra. At one level, such standards can be plotted along a spectrum which consists of 'employee subjectivity' at one extreme to 'adjudicator subjectivity' at the other – the 'subjective/objective' spectrum referred to above. A standard of 'employee subjectivity' envisages a minor role for an adjudicator, their task being restricted to a review of whether the employer had a genuine belief (i) that its conduct was reasonable or lawful, (ii) that it complied with a particular duty or (iii) that the reason for its conduct was reasonable or

[78] Jacobs F. G., 'Recent Developments in the Principle of Proportionality in European Community Law' in Ellis E., *The Principle of Proportionality in the Laws of Europe* (Oxford, OUP, 2004) 1.

lawful.[79] Meanwhile, 'adjudicator subjectivity' at the other end of the scale affords the adjudicator the power to form its own opinion of the employer's conduct or reasons for its conduct, entitling it to substitute its own judgment for that of the employer and intervene liberally. In other words, the adjudicator has the power to apply an objective test; objective in the sense that the adjudicator can have regard to outside factors, practice and their own opinions.

Such a spectrum has a particular attraction since it is clear that some of the standards which have been discussed are expressed in terms of objectivity or subjectivity to a degree. However, whilst locating the relevant standards in the employment relationship in such a way would be illuminating to an extent, it is opined that some of the standards are not easily plotted against such a band. For example, it is not wholly clear where the 'irrationality' and 'range of reasonable responses' standards would lie in such a spectrum. Such a pursuit is not as straightforward as say pinpointing the location of the s. 214 Insolvency Act 1986 and s. 174 Companies Act 2006 standards of conduct imposed on directors which comprise a clear mixture of subjective and objective standards. For that reason, the writer has chosen to abandon the 'employee subjectivity'/'adjudicator subjectivity' spectrum and instead adopt the second possible spectrum, namely the simpler scrutiny spectrum referred to above. That is to say that the four standards of review which have been discussed will be mapped across a spectrum from the most onerous to discharge to the least exacting on the employer, with the relative intensities of review being plotted in terms of 'weak' to 'strong' intervention.

In terms of such a formulation, one can think of a hierarchy of standards with objectivity exercising the most constraint on the employer, closely followed by the proportionality standard, with the

[79] A classic example from the field of company law is the now defunct 'subjective' test associated with the director's duty of care, skill and diligence in the case of *Re City Equitable Fire Insurance Co* [1925] Ch 401. Here, whether a director had breached his duty to exercise 'skill and care' was assessed by reference to what may reasonably have been expected from a person of his knowledge and experience.

‘range of reasonable responses’ test resting in the middle, and irrationality exerting the least control on the employer at the bottom of the range. See figure 1 for further details. Figure 2 labels the relative rights against the standards of review. However, in constructing such figures, one must recall that the nature of the review in the case of the standards themselves are not always linear. For example, the proportionality test is not exactly uniform in its application, since the degree of scrutiny of the primary decision-maker which is associated with the standard varies in intensity and whilst it does not empower adjudicators to impose their own judgment over employers, it does invite them to engage in a more intrusive review of the employer’s practices than that of the ‘range’ and the irrationality standards. Moreover, the degree of review displayed by certain standards may be conditioned by the nature or terminology of the right to which the standard attaches. For example, in the context of the implied term of mutual trust and confidence, the amorphous nature of the objective standard is particularly evident. This is the case since the nature of the review in the context of the standard is quite high by the very intrinsic nature of the right to which the standard is aligned, i.e. the destruction or serious undermining of trust and confidence. Nevertheless, it is submitted that this does not detract from the underlying contention that the intrinsic nature of the standards can be charted in terms of a hierarchy at a more general level of analysis.

Figure 1

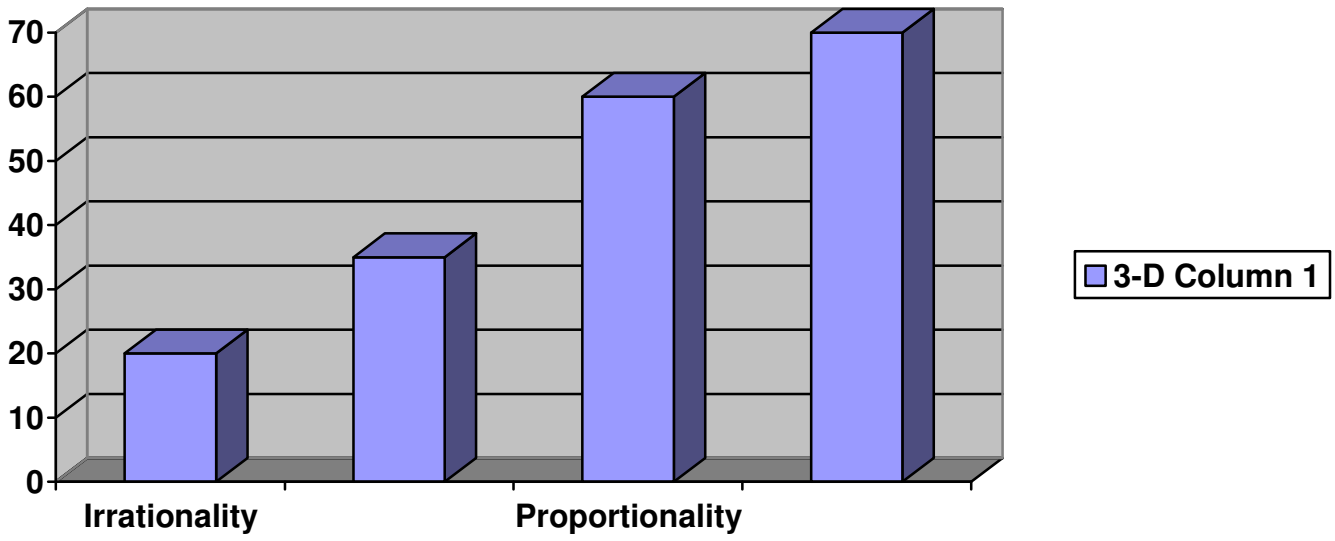
STRENGTH OF STANDARD
70
60
50
40
30
20
10
0
Irrationality
Proportionality
3-D Column 1
STANDARD

Figure 2

Standard of Review	Employment Right(s)
Objective Test	(1) Right of an employee to have the employer exercise reasonable care for his physical and psychiatric welfare; (2) Right of an employer not to have trust and confidence in the employment relationship destroyed or seriously undermined without reasonable and proper cause; (3) Right of disabled employee to have employer make reasonable adjustments to physical features of the workplace or provisions, criteria or practices applied by or on behalf of the employer.
Proportionality test	Right of an employee not to be indirectly discriminated against on the basis of a disproportionate application of a provision, criteria or practice by the employer.
Range of Reasonable Responses Test	(1) Right of an employee not to be unfairly dismissed; (2) Right of an employee not to be treated less favourably for a reason related to his/her disability where the justification for such treatment is not both material to the circumstances of the particular case and substantial; (3) Right of an employee not to be constructively dismissed, in the sense that an employer must demonstrate 'reasonable and proper cause' for trust-destroying conduct in the context of the handling of an employee's grievance.
Rationality Test	Right of an employee in the context of the discretionary bonus/benefits implied term and the anti-avoidance implied term.

B. Disadvantages

The principal difficulty with an autonomous body of law such as labour law possessing different standards in different rights contexts is that the facts of cases cannot be put into neat pockets in the same way as the rights and the standards. In practice, when an employee presents a complaint to an employment tribunal, or initiates an action before a court, that complaint or action may well entail a claim for breach or infringement of a right which attracts a 'range of reasonable responses' standard alongside a claim for breach or infringement of a right which is based on an objective standard. A good example would be the situation where an employee claims unfair dismissal and a breach of the duty to make reasonable adjustments (i.e. a s. 3A(2) DDA complaint) in the same case. The dismissal will be judged according to the 'range of reasonable responses' standard, but the duty to make reasonable adjustments on the same set of facts will be examined on a purely objective basis. As a practitioner, the temptation may present itself to pursue the DDA claim with more vigour given the comparative laxity of the objective standard and the availability of uncapped compensation in the case of the disability discrimination claim.

Moreover, rather confusingly, complaints or actions based on a claim for breach of certain rights in the same employment context sometimes attract different standards. As has been explained in this article, the statutory employment rights associated with disability discrimination and the statutory right not to be constructively dismissed are the classic examples of this feature. Further, there are circumstances where the law prescribes that specific employment rights themselves will (a) involve more than one stage of analysis with a particular standard applied to the employer's conduct at one stage and then a differing standard at a later stage or (b) automatically transform by operation of law from one particular standard to a differing standard in a particular fact-specific

context. Again, as has been outlined in this paper, the statutory right not to be constructively dismissed is the paradigm here. Finally, it is possible for circumstances to exist where an employee or employer might have been more successful if their case had been brought on the basis of an alternative head of claim which imposes a less forgiving standard of review on the employer. For example, an employee who lost his claim on the basis that his employer's failure to pay a discretionary bonus was not irrational may have been better off by claiming that the failure to pay the bonus amounted to a breach of the implied term of mutual trust and confidence – which would be assessed on purely objective criteria.

The current balance in labour law which is forged between the power of management and the labour force is also open to the charge that the presence of diverse standards operates to increase transaction costs, which are externalised by employers by passage onto employees and consumers of their products and services. One might argue that the presence of differing behavioural expectations sends mixed signals to employers about the level of expectation which the law has regarding their conduct, actions and decisions in the workplace. Given the complexity of the legal position, external professional advice is crucial to enable employers to understand and apply the law correctly. Moreover, from the viewpoint of an adjudicator, diverse standards of review impose adverse mental gymnastics which raises concerns about the legitimacy of their role and the soundness of their decisions. The recent case of *Claridge v Daler Rowney Ltd*.[80] is a good example. The costs and degree of litigation may increase since there is greater opportunity for appeals to be made on the basis that the tests have been applied incorrectly by lower courts or tribunals. Considering this factor from the viewpoint of the employee, one might argue that the current

[80] [2008] IRLR 672.

balance indirectly leads to less job security since increased costs will deter employers from hiring further staff.

Thus, from a formalistic perspective of labour law, i.e. a perspective which treats labour law as an autonomous discipline which strives towards internal intelligibility in the mould of the arguments advanced by Weinrib (which are applied towards private law as a legal institution), the perception is that the law lacks coherency. That is to say that the normative connections which the presence of diverse standards articulate between the various components of labour law are such that 'the incremental transformation or reinterpretation or even… repudiation of specific decisions [is necessary] so as to make them conform to a wider pattern of coherence.'[81] The sense in which the word coherence' is used here differs from 'consistency'. As MacCormick has persuasively argued, 'consistency' is satisfied if a grouping of rules or standards do not contradict each other. However, although such a grouping may be non-contradictory, they will be 'incoherent' if, as 'a set of propositions… taken together, [they do not] make sense in [their] entirety.'[82] Thus, the overall thrust of the formalistic objection is that the standards of review ought to be reformed in order that there is a better degree of coherency and consistency in the field of labour law.

C. Justifications

As expressed above, there is temptation from a formalist perspective to express the view that the law is inefficient and incoherent and in need of wholesale reform for the reasons advanced. However, as expressed in an earlier paper, if one is seeking to reflect the importance of an employment right on grounds of policy or from a perspective of constitutional, human rights or

[81] E. Weinrib, *The Idea of Private Law* (Cambridge, Massachusetts, Harvard University Press, 1995) 13.
[82] N. MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning*, (Oxford, OUP, 2005) 190.

the recognition of fundamental values, it may be logical and valid to establish differing behavioural standards in the same or broadly similar contexts. So the counter-argument based on a functionalist analysis of labour law is that differing contexts demand differing standards. In the absence of differing standards, there would be insufficient particularity which is not an efficient economic policy goal.[83] Moreover, objectivity is only really appropriate where there is only one or very few appropriate or acceptable decisions or conduct which can be taken by management when faced with certain events. One might also adopt the position that divergences in legal standards represent a form of balancing mechanism in response to the prevalence of Governmental policy preferences in favour of fostering managerial adaptability, flexibility and 'light touch' regulation.[84] In other words, that in return for Governmental support for the flexibilisation of the workplace and limited regulation of the labour market over the past 30 years or so, employers must be expected to handle differing standards of review in the context of different (and sometimes the same) employment rights.

Moreover, the intensities of scrutiny associated with the differing standards enable us to understand the relative significance of various employment rights. The previous paper of the writer advanced the normative proposition that there is a co-relation between the intensity of scrutiny associated with a standard of conduct and the employment right to which that standard is attached. That is to say that the greater the deference to the employer associated with the selected standard of conduct, the less important the law would appear to treat the right and the latent values which influence its content and scope of application. This is a crucial point, since it ensures that the degree of scrutiny conferred upon an adjudicator in the context of an

[83] H. Collins, *Regulating Contracts*, pp. 76-79.
[84] P. Davies and M. Freedland, *Towards a Flexible Labour Market: Labour Legislation and Regulation Since the 1990s* (OUP, 2006) at 20-23, 37-39 and 44-45.

employment right is pitched at a level which recognises fundamental precepts and the collective goals of the community. Although the previous paper demonstrated how the standard of conduct may diverge from the standard of review for reasons of policy or fairness, it is argued that there are very few rights contexts where this occurs in the field of labour law.[85] Accordingly, it is submitted that it remains undoubtedly a useful exercise to examine the intensity of scrutiny associated with the standard of review for a reflection of the significance of the employment right and the values and policies which lie beneath that right. On this basis, equipped with the benefit of figure 2, employment rights can be charted in terms of a hierarchy of significance, as follows: -

Most Significant
(1) Right of an employee to have the employer exercise reasonable care for his physical and psychiatric welfare; (2) Right of an employer not to have trust and confidence in the employment relationship destroyed or seriously undermined without reasonable and proper cause; (3) Right of disabled employee to have employer make reasonable adjustments to physical features of the workplace or provisions, criteria or practices applied by or on behalf of the employer.
Right of an employee not to be indirectly discriminated against on the basis of a disproportionate application of a provision, criteria or practice by the employer.
(1) Right of an employee not to be unfairly dismissed; (2) Right of an employee not to be treated less favourably for a reason related to his/her disability where the justification for such treatment is not both material to the circumstances of the particular case and substantial; (3) Right of an employee not to be constructively dismissed, in the sense that an employer must demonstrate 'reasonable and proper cause' for trust-destroying conduct in the context of the handling of an employee's grievance.
Right of an employee in the context of the discretionary bonus/benefits implied term and the anti-avoidance implied term.
Least Significant

[85] The example of the concept of substantive fairness of a dismissal in the context of section 98(4) ERA is one particular example.

D. A case for limited re-alignment?

In advance of any consideration of the necessity of any programme of reform of standards in the employment relationship, it is submitted that there is a prima facie case for some limited re-alignment of standards in similar and identical employment contexts. First, as the author has argued elsewhere,[86] the normative content of the discretionary bonus/benefits implied term and the anti-avoidance implied term ought to be re-conceptualised. It is submitted that such a rationalisation ought to be conducted within the framework of the implied term of mutual trust and confidence, which is also an implied term steeped in terms of 'good faith' standards and the regulation of discretionary powers. Thus, in determining whether an employer's decision not to award a bonus (or pitch a bonus at a particular financial level) is unlawful, the applicable standard ought to be objective in nature. Likewise, in the case of an adjudicator's enquiry under the rubric of the anti-avoidance implied term, an objective test should be applied. In terms of such a framework, an objective standard would be applied in order to test whether the employer has dismissed an employee in order to avoid the making of guaranteed or conditional payments to the employee. Secondly, it is submitted that there is also a case for limited re-constitution of standards in the case of the concept of constructive dismissal. Where an employee's claim is that the employer has committed a repudiatory breach of contract amounting to a breach of the term of implied trust and confidence, whether the employer has reasonable and proper cause for their actions or omissions ought to be examined on the basis of a single test, namely an objective test. This would remove the complex and at times somewhat confusing line of legal analysis which must be applied as a consequence of the recent quarter of cases of *RDF Media Group Plc v Clements*,[87]

[86] D. Cabrelli, "Discretion, Power and the Rationalisation of Implied Terms" (2007) 36 *ILJ* 194, 201.
[87] [2008] IRLR 207, 218 at para. [103] per Livesey QC.

Abbey National plc v Fairbrother,[88] *GAB Robins (UK) Ltd. v Triggs*[89] and *Claridge v Daler Rowney Ltd*.[90] It is objectionable to for varying standards to be deployed 'within a single type of case having a single common topic.'[91]

As for the broader assertion that labour law as an autonomous body of law displays a lack of coherence by virtue of the existence of differing behavioural standards in the same contexts and differing contexts, a degree of caution ought to be exercised. To recap, from a formalist perspective, the argument has been advanced that the recalibration of standards of review is required in order to build a more rational body of labour law. Secondly, labour law is open to the charge that it is confusing and costly for employers and adjudicators to apply. Whilst there is indeed force in such arguments, rather than accede to calls that law reform is crucial, it is perhaps more compelling to investigate and establish how the law and the concomitant standards are actually being applied in legal practice before one rushes to judgment. This would involve undertaking empirical research to ascertain how practising lawyers applied the standards of review which attach to employment rights. The emphasis would be on the legal processes and strategies which are deployed by employees, employers and their respective legal advisers in dealing with (i) disputes and/or (ii) initiated complaints or actions based on particular employment rights. By identifying the approaches of the main protagonists and their advisers to disputes arising inside and outside the tribunals and courts, it is submitted that a well-balanced picture of how standards are being applied will emerge. In particular, such empirical research would reveal the constraints under which primary decision-makers perceive themselves to be labouring.

[88] [2007] IRLR 320, 325 at para. [36].
[89] [2007] IRLR 857, 861 per Clark J.
[90] [2008] IRLR 672.
[91] N. MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning*, (Oxford, OUP, 2005) 178.

As to the methodology of the research, one could envisage value in undertaking empirical research which focuses on an examination of samples of (i) written claim forms and written court pleadings in the context of cases which were heard in the employment tribunal or court and (ii) files and written documents relevant to cases which were settled before they proceeded to a tribunal or court hearing. Moreover, interviews with the legal advisers of employees and employers would be of evident utility. However, in undertaking such an analysis, from a theoretical perspective, the writer is alive to the necessity of avoiding the inevitability of a binary conclusion, i.e. that employees, employers and legal practitioners either *do* or *do not* perceive themselves to be operating under constraints as a consequence of the presence of the hierarchy of diverse standards. Instead, the writer's objective is to keep open the possibility of the emergence of more nuanced conclusions which may signpost the way to alternative directions in which future research may proceed.

4. Conclusion

Is it sustainable from a formalist perspective for the employment relationship to continue to be regulated in a manner in which employers are expected to discharge differing standards of review (which attract varying intensities of scrutiny of managerial action) in the same or similar contexts in order to satisfy the legal obligations which they owe towards their employees? This is the central question which this article has made preliminary and somewhat tentative steps to address. The writer has sought to take matters forward by outlining the nature of the diverse standards and the rationales in favour of and against a hierarchical structure. Further, it is hoped that a clearer picture of the forces which have shaped the differing behavioural standards in the workplace has been painted. The writer believes that there is a forceful case for the limited re-constitution of

standards in terms of constructive dismissal claims and the implied terms of the contract of employment which are concerned with regulating the employment relationship for fair dealing. However, further empirical research which considers the approaches and perceptions of employees, employers and legal practitioners is required before a definitive answer can be provided to the key question posed at the beginning of this conclusion. To that extent, this paper represents an initial attempt at establishing the parameters against which such research may be conducted.